IN THE

Supreme Court of the United States.

No. 40,
OCTOBER TERM, 1924.
(29544)

UNITED STATES OF AMERICA,
Petitioner,

vs.

GULF REFINING COMPANY,
Respondent.

MOTIONS TO DISMISS AND TO AFFIRM.

R. L. BATTS,
JAMES B. DIGGS,
FRANK M. SWACKER,
Attorneys for Respondent.

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Now comes Gulf Refining Company, the respondent herein, by R. L. Batts, James B. Diggs and Frank M. Swacker, its attorneys, and moves this Court to dismiss and quash its writ of certiorari herein for want of jurisdiction or because the same was improvidently issued, for the reasons stated in the annexed argument; and the said respondent also moves this Court to affirm the judgment of the Circuit Court of Appeals, for the Eighth Circuit, in said cause, upon the ground that it is manifest that the questions on which the decision of the cause depends are so frivolous as not to need further argument.

R. L. BATTS,
JAMES B. DIGGS,
FRANK M. SWACKER,
Attorneys for Respondent.

PLEASE TAKE NOTICE, that, upon all the papers and proceedings herein, we shall submit to the Supreme Court of the United States, at a stated term thereof, on Monday, ~~October 20th~~ November 17, 1924, at the Capitol in the City of Washington, D. C., at the opening of court on that day or as soon thereafter as counsel can be heard, the motions of which the foregoing are copies; and that we shall submit with said motions, and in support of the same, the arguments annexed hereto.

Yours, etc.,

R. L. BATTS,
JAMES B. DIGGS,
FRANK M. SWACKER,
Attorneys for Respondent.

To

HON. JAMES M. BECK,
Solicitor General of the United States,
for Petitioner,
Washington, D. C.

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ARGUMENT.

Statement.

The writ of certiorari in this case was issued to bring up for review from the Circuit Court of Appeals, for the Eighth Circuit, its judgment setting aside a judgment of conviction in the District Court of the United States, for the Eastern District of Oklahoma, on an indictment, and remanding the case to said District Court, with directions to grant a new trial (*Record, p. 1692*).

The indictment, in ninety-nine counts, attempts to charge the respondent with having obtained from certain common carriers concessions, from the lawful rate applicable thereto, with respect to the transportation of certain shipments alleged to have consisted of gasoline, in violation of the Elkins Act (*Rec., pp. 1-145*).

During the period covered by the indictment, there were in force, over the routes and between the points between which the transportation occurred, other and lower rates applicable to the transportation of unrefined naphtha, which rates the carriers had instituted at the respondent's request (*Rec., pp. 559-574*).

There was and is no dispute concerning the identity of the commodity shipped. The dispute is concerning its proper name; that is, whether it is gasoline, as charged in the indictment, or unrefined naphtha, as is insisted by the respondent. The material is a liquid condensate of petroleum gas and is commonly called "casinghead gasoline", although called by many other names (*Rec., pp. 321, 682, 683*).

It is conceded by the respondent that the material is popularly (but erroneously) called "gasoline" (*Rec., p. 694*). On the other hand, it is conceded by the Government that the material is unfinished as gasoline (*Rec., pp. 883-892*).

Just before submitting this issue of fact to the jury, the District Court overruled, without serious consideration, the contentions of law made by the respondent, although stating that were the defendant an individual whose liberty was at stake, instead of a corporation, he would not do so (*Rec., p. 899*).

The jury found for the Government, and the respondent took a writ of error, assigning one hundred and nineteen errors (*Rec., pp. 1542-1665*), almost all of which were with respect to rulings upon questions of evidence, prejudicial summing up by the Government in appealing to pecuniary interests of the jury, and the giving and refusing of certain charges to the jury by the Court.

The Circuit Court of Appeals, without passing on the questions raised by respondent concerning the application or construction of the Act or the indictment, reviewed the evidence dealing with the principal fact, *i. e.* the proper name of the commodity, and found meritorious assignments of error concerning the introduction of certain evidence and argument by the Government that it imported fraudulent conduct on the part of the respondent, which the Circuit Court of Appeals considered, in the light of the testimony in the case, was a groundless contention and highly prejudicial; that certain other testimony admitted concerning respondent's course in other circumstances was without evidentiary weight, and that other testimony concerning the course of other shippers under other circumstances, or without any showing of similarity of circumstances, was erroneously admitted. It also found meritorious assignments of error concerning statements made by counsel for the prosecution in argument of which there was no evidence in the record, and which

> "could have been made for no other purpose than to prejudice the jury against"

two of respondent's expert witnesses. It also found meritorious assignments of error concerning argument by Government counsel to the jury to the effect that, the shipments having moved during the period of federal control, the jurors themselves would have to contribute (by way of income taxes) to make up any deficiency in operation, and that the defendant, by the advantage which it got over its competitors, in this way placed in its own

"pocket hundreds of thousands of dollars which they were not entitled to, and which the people of the United States have got to bear the burdens, and it is true that the Gulf Refining Company will have to join, thank goodness, the other people of the United States to pay these things if it had to be paid."

After considering the foregoing assignments of error, the Court said (*Rec., pp. 1691, 1692*):

"All of the assignments that have been mentioned are in our judgment meritorious, the matters complained of were prejudicial and would require a reversal. Many errors are assigned, to the admission and rejection of evidence, to the instructions of the court, to the refusal of requests to instruct, and to comments by the court during the progress of the trial, which it is claimed were prejudicial and unfair. But the view we take of the case renders it unnecessary to pass on them.

"It is our opinion that when all competent and relevant proof in the case is given a fair and impartial consideration the conclusion that the verdict is without support is inevitable. The prosecution rested its case in chief on testimony of operators of casing-head compression plants that they called the condensate and their blended products gasoline, believed they were gasoline and shipped them as gasoline; and also on the claimed admissions about which we have expressed our opinion. They could not ship their products otherwise, there was no rate on unrefined naptha or unfinished naptha to their points of destination; and as to the shipments to the Texas Company at Port Arthur, on which gasoline rates had been exacted and collected, that company had pending in the

U. S. District Court for the Eastern District of Texas at the time of the trial an action for the recovery of the difference between what it had been required to pay and the rates on unrefined naptha. The defendant then called witnesses thoroughly familiar, technically and practically, with the recovery of petroleum and natural gas, their treatment, their component parts, their reduction to usable and marketable commodities, and they were in accord in their testimony that the commodities were appropriately designated as unrefined naptha, were unrefined naptha and were not gasoline, and could not be appropriately so designated. They stated the facts on which their conclusions were based. Then the best informed witnesses in behalf of the prosecution, the only ones who spoke with general information on the subject, Dr. DeBarr and Mr. Dykema, were called and both stated that casing-head condensate was too volatile and dangerous for use as gasoline—the former as a witness and the latter in his article prepared and issued as an official bulletin by the Bureau of Mines; and neither claimed that either the condensate or the blended product would fulfil any specification for gasoline.

"We think the court erred in refusing defendant's request for an instructed verdict in its favor."

For respondent, it is contended:

1. That the writ of certiorari should be dismissed, (*a*) for lack of jurisdiction in the Court to review, by certiorari (or otherwise), a judgment of the Circuit Court of Appeals in favor of a defendant in a criminal case (other than under the Criminal Appeals Act—not here

involved), or (*b*) because, even if there is jurisdiction in a proper case, the instant one is not such, the judgment of the Circuit Court of Appeals not being a final judgment but a remand for a new trial, and there being no extraordinary circumstances such as warrant the exercise of the power; or

2. That the judgment of the Circuit Court of Appeals should be affirmed, because the questions on which the decision of the cause depends are so frivolous as not to need further argument.

I.

A. Jurisdiction.

As the appellate jurisdiction of this Court is purely statutory, the initial inquiry in this case is necessarily as to the existence of jurisdiction of the review sought.

> "By the Constitution of the United States, ... cases to which the judicial power of the United States extends, and of which original jurisdiction is not conferred on this court, 'the Supreme Court shall have appellate jurisdiction, with such exceptions and under such regulations as the Congress shall make.' Constitution, art. 3, sec. 2 This court, therefore, as it has always held, can exercise no appellate jurisdiction, except in the cases, and in the manner and form, defined and prescribed by Congress."
>
> *American Construction Co.* v. *Jacksonville Railway, 148 U. S. 372, 378.*

In *United States* v. *Sanges, 144 U. S. 310,* this Court, upon a writ of error, considered at length the question whether the provision of the Judiciary Act of 1891 concerning the review by it on appeals or writs of error of cases involving the construction or application of the Constitution (*Act of March 3, 1891, chap. 517, sec. 5; 26 Stat. 827, 828*) conferred upon the United States the right to sue out a writ of error in any criminal case; and, after a careful review of the English and State cases, reached the conclusion that those cases show that under the common law, and in the absence of express statutory provision giving such right to the State, a writ of error cannot be sued out in a criminal case after a final judgment in favor of the defendant, whether that judgment has been rendered upon a verdict of acquittal or upon a determination by the court of an issue of law.

The Court then, after reviewing the history of the section in question and other provisions of the Judiciary Act, reached the conclusion that the provision for review by it by writ of error, as applied to a criminal case, did not

> "confer upon the United States the right to bring up a criminal case of any grade after judgment below in favor of the defendant" (*p. 323*).

And further stated:

> "It is impossible to presume an intention on the part of Congress to make so serious and far-reaching an innovation in the criminal jurisprudence of the United States" (*p. 323*).

After the decision in the *Sanges case, supra,* by the Criminal Appeals Act (*March 2, 1907; 34 Stat. 1246*)

it was expressly provided that a writ of error might be taken on behalf of the United States from the District or Circuit Courts direct to this Court in certain specific instances; that is, from a judgment dismissing an indictment or arresting judgment thereon, where the judgment is based upon invalidity or construction of the statute; and from a judgment sustaining a special plea in bar when the defendant has not been put in jeopardy. And even in this limited class of cases it is required that the writ must be taken within thirty days and diligently prosecuted, and shall have precedence over all other cases, and that pending determination the defendant shall be admitted to bail on his own recognizance; and it is further expressly provided that in no circumstances will the writ be allowed where there has been a verdict in favor of the defendant.

It will be observed that this serious and far-reaching innovation in the criminal jurisprudence of the United States was made in most explicit terms and surrounded with explicit limitations and safeguards. It alters the rule laid down in the *Sanges case* as applied only to the particular instances embraced; that is, judgments dismissing indictments or arresting judgment thereon, for invalidity, or on the construction, of the statute, or on special pleas in bar.

In *United States* v. *Keitel, 211 U. S. 370,* concerning the scope of the Criminal Appeals Act, this Court said (*pp. 398, 399*):

> "That act, we think, plainly shows that in giving to the United States the right to invoke the authority of this court by direct writ of error in the cases for which it provides contemplates vest-

ing this court with jurisdiction only to review the particular question decided by the court below for which the statute provides. In other words, that the purpose of the statute was to give the United States the right to seek a review of decisions of the lower court concerning the subjects embraced within the clauses of the statute, and not to open here the whole case. We think this conclusion arises not only because the giving of the exceptional right to review in favor of the United States is limited by the very terms of the statute to authority to re-examine the particular decisions which the statute embraces, but also because of the whole context, which clearly indicates that the purpose was to confine the right given to a review of the decisions enumerated in the statute, leaving all other questions to be controlled by the general mode of procedure governing the same."

In *United States* v. *Dickinson, 213 U. S. 92,* this Court, having granted its writ of certiorari to review a judgment of the Circuit Court of Appeals, for the First Circuit, setting aside a judgment of conviction in a criminal case and remanding it to the District Court "for further proceedings in accordance with law" because of the urgency of the Government as to the importance of the particular decision, notwithstanding the judgment of the Circuit Court of Appeals was not final, at the threshold of the consideration of the case found itself confronted with the question of its power to grant its writ of certiorari under the Act of 1891 in a criminal case, whatever the supposed importance of the question involved.

Section 6 of that Act (*26 Stat. 826*), after setting forth the jurisdiction of the Circuit Court of Appeals and

providing for the certification by it to the Supreme Court of questions upon which it desires instructions, and providing that the Supreme Court may either give such instructions or require the whole cause to be sent up for its determination in the same manner as though brought here for review by writ of error or appeal, provides:

> "And excepting also that in any such case as is hereinbefore made final in the Circuit Court of Appeals it shall be competent for the Supreme Court to require, by certiorari or otherwise, any such case to be certified to the Supreme Court for its review and determination, with the same power and authority in the case as if it had been carried by appeal or writ of error to the Supreme Court."

After calling attention to the fact that the provisions in the clauses relating to appeals or writs of error, where constitutional questions were involved, made no distinction in their language between civil and criminal cases, and no distinction as to the party who was aggrieved by the decision in the court below, and referring to its decision in the *Sanges case, supra,* this Court stated (*213 U. S. 99*) that it was there held,

> "on great consideration, that the right of review given by that provision of section 5, so far as it related to criminal cases, must be limited to review at the instance of the defendant after a decision in favor of the Government. The decision was reached after a thorough examination of the Federal legislation as to appellate jurisdiction in criminal cases and of the authorities in England and in the United States relating to criminal appeals, in which the court finds no precedent without express

> statutory enactment for any review of any judgment in favor of the accused."

It was argued by the Government, however, that the general power to issue writs provided by Section 14 of the Judiciary Act of 1789 would authorize its use for the purpose. But the Court said (*p. 100*):

> "But that was not a grant to this court of appellate jurisdiction to review by certiorari for the mere correction of error any or all decisions of the lower Federal courts not otherwise reviewable."

And, after quoting from its opinion in *American Construction Co.* v. *Jacksonville Railway, 148 U. S. 372,* concerning the scope of the power of the Court to issue original independent writs, this Court said (*p. 102*):

> "But the distinction between preventing excesses of jurisdiction and the mere correction of error is a fundamental one, and the rule remains that appeal and writ of error, being the proper forms of procedure provided for the mere correction of error, the appellate jurisdiction of this court for that purpose is limited to the cases in which express provision is made for appeals or writs of error, and that certiorari cannot be independently used to supply the place of a writ of error for the mere correction of error."

It was further argued by the Government in the *Dickinson case* (citing *Forsyth* v. *Hammond, 166 U. S. 506, 514, 515,* and *American Construction Co.* v. *Jacksonville Railway, 148 U. S. 372,* as authority) that it was competent, under the Act of March 3, 1891, for this Court to take away from the final determination of any Circuit

Court of Appeals, at any stage before or after decision rendered in that court, *any* case involving questions of gravity and general importance, including the review of a criminal case on certiorari on the application of the Government, to the same extent that it might review a civil case. There is nothing, however, in either of those cases to indicate that they tend to overrule or modify in the slightest what was said by the Court in the *Sanges case*. On the contrary, the statements in *Forsyth* v. *Hammond, supra,* concerning the court's authority to issue the writ—which relates more directly to the stage of the case below than to its character—are expressly limited by the preceding statement of the Court (*166 U. S. 513*):

> "It applies to every case in which but for it the decision of the Circuit Court of Appeals would be absolutely final, and authorizes this court to bring before it for review and determination the case so pending in the Circuit Court of Appeals, and to *exercise all the power and authority over it which this court would have in any case brought to it by appeal or writ of error.*" (Italics ours.)

Manifestly if, as held by the Court in the *Sanges case,* the Court is without power *on writ of error* to review a judgment in a criminal case favorable to the accused, that would be the extent of its power and authority upon *certiorari.*

It was also argued by the Government in the *Dickinson case* that the Act of 1891 might be construed to confer upon the Government a right of review in criminal cases because the Criminal Appeals Act (passed after the decision in the *Sanges case*) provided for a writ of error

in behalf of the Government in criminal cases. But the Court rejected that argument also, again holding that the Criminal Appeals Act was strictly limited to review of judgments in the specified classes of cases only, and was not to be extended beyond its terms.

It may be taken, therefore, as settled law up to the time of the decision in the *Dickinson case* that the United States was without right, either by certiorari or writ of error, to a review of a judgment adverse to it in a criminal case, save only the cases specifically covered by the Criminal Appeals Act, and that

> "so serious and far-reaching an innovation in the criminal jurisprudence of the United States"

would be deemed to have been made only by the use of most explicit language.

After the decision in the *Dickinson case,* the provision concerning certiorari contained in the Act of 1891 (now Section 240 of the Judicial Code) was amended by the addition of the words shown in black face below:

> "In any case, **civil or criminal,** in which the judgment or decree of the circuit court of appeals is made final by the provisions of this Title, it shall be competent for the Supreme Court to require, by certiorari or otherwise, **upon the petition of any party thereto,** any such case to be certified to the Supreme Court for its review and determination, with the same power and authority in the case as if it had been carried by appeal or writ of error to the Supreme Court."

The question is, does the addition of these words, "civil or criminal" and "upon the petition of any party

thereto", in clear and explicit terms effect a change in the criminal jurisprudence of the country even more radical than did the Criminal Appeals Act? If it had the effect of conferring upon the Government a right of review of a decision adverse to it in a criminal case, it would be far more radical and comprehensive than the Criminal Appeals Act, without doubt. It would embrace not only the cases specifically enumerated by the Criminal Appeals Act, but also those specifically excepted therefrom by it, *i. e.* even cases where there had been previous jeopardy.

Of course, a construction extending it to cases of previous jeopardy would not be given, because of conflict with the Fifth Amendment; yet it is not excepted, as in the Criminal Appeals Act, but would be literally embraced.

The amendment does not purport to affect the Criminal Appeals Act. Yet, giving it the construction suggested, it would have the practical effect of repealing the limitations—such as personal recognizance and expedition—contained therein by the simple alternative of applying for a writ of certiorari instead of a writ of error.

Dealing now with the question of power—propriety aside, for to government bureaus all prosecutions are of peculiar gravity and general importance—the Government would be entitled to seek a review in every criminal case in which a conviction was reversed by the Circuit Court of Appeals, regardless of the character of error involved. By far the great majority of such cases turns solely on ordinary questions of evidence. Yet it is to be supposed that this Court might be importuned to review

every such case. If such was the object of the legislation, the conferring of jurisdiction in the Circuit Court of Appeals to render *final* judgments would be a misnomer and a vain gesture. Could not more apt language be found to affect any such legislative intention? No difficulty was experienced in finding it for the Criminal Appeals Act. That Act does not conceal the right under the phrase "upon the petition of any party", but says "by and on behalf of the United States." The addition of the words "civil or criminal" does not necessarily enlarge the provision beyond the scope of the Act at the time of the decisions of the *Sanges* and *Dickinson cases.* The phrase "any case" certainly includes both civil and criminal cases, and criminal cases were certainly among those in which the judgment of the Circuit Court of Appeals was made final.

A meaning can be found for the added words without construing them as effecting such a radical change. Defendants jointly indicted are both parties to a criminal case, and it may be that the object of the language was to confer upon one of them the right to invoke the privilege, whether the other joined in the petition or not.

If it be intended that the Government, as a party in a criminal case, should have the benefit of the amended statute, cases are conceivable where the Government might apply for certiorari that would not involve a review of a decision of the Circuit Court of Appeals adverse to the Government in a criminal case. For example, it might be used to remove a criminal case of widespread importance from the Circuit Court of Appeals *before* final judgment by that court, in order to se-

cure an authoritative determination by this Court. The right might be used to remove a writ of error from the Circuit Court of Appeals (before decision) because one of the Judges thereof had participated in the decision below, as, for instance, in *American Construction Co.* v. *Jacksonville Railway, 148 U. S. 372, 383.* Such instances would be fundamentally different from permitting the Government to speculate, first, on its chances in the Circuit Court of Appeals, and then, on being defeated there, to vex and harass a defendant by what would amount to a second appeal. This Court has said repeatedly that the function of the writ of certiorari is not to accord a defeated party another chance.

> "The jurisdiction was not conferred upon the court merely to give the defeated party in the Circuit Court of Appeals another hearing."
>
> *Magnum Import Co.* v. *Coty, 262 U. S. 159, 163; 67 L. Ed. 922.*

The Government may suggest that reference to the debates in Congress will show that the intent of the amendment was to confer upon it, in the discretion of this court, the right to a review of judgments adverse to it in criminal cases, notwithstanding this court has repeatedly said that they are

> "not appropriate sources of information from which to discover the meaning of the language"

used, as in *United States* v. *Trans-Missouri Freight Assn., 166 U. S. 290,* where it further said (*p. 318*):

> "The reason is that it is impossible to determine with certainty what construction was put

> upon an act by the members of a legislative body that passed it by resorting to the speeches of individual members thereof. Those who did not speak may not have agreed with those who did; and those who spoke might differ from each other; the result being that the only proper way to construe a legislative act is from the language used in the act, and, upon occasion, by a resort to the history of the times when it was passed."

Such a reference in the instant case not only does not support the construction suggested, but most aptly illustrates the situation above suggested by the Court.

From a reference to the Congressional Record of February 8, 1911, it would appear from the questions of Senator Heyburn and the replies of Senator, now Mr. Justice, Sutherland, that the latter considered the amendment would work the result suggested. After the bill went to conference, however, the House Conference Committee Report (*46 Cong. Rec., p. 4001*) showed an entirely different conception of the purposes and effect of the change. It is as follows:

> "The other amendments made by the Senate, embracing substantive changes were as follows:
>
> * * * * * *
>
> "Section 240 (227). The insertion of the words, 'civil or criminal,' and the words, 'upon the petition of any party thereto.' The effect of this amendment is to make more clear the right of the Supreme Court of the United States by writ of certiorari to bring before it for review any case in which the judgment or decree of the Circuit Court of Appeals is made final by the provisions of the Act, and to define more accurately the method by which such writ might be obtained."

Granting a new right is not making "more clear" an existing right, nor is the providing of process for the exercise of a right newly granted equivalent to "define more accurately the method" of exercise of an existing right. And such a resort, for the purpose of proving the intent of the legislation, proves too much; for such a necessity is at once an admission of the absence of clear and explicit terms, such as this Court, in the Sanges case, considered requisite, and such as was employed in the Criminal Appeals Act. However, regardless of the intent of the legislation, it is beyond cavil that what was done, rather than what was intended, controls.

No change whatever was even attempted to be made in the scope of review. Whatever change may have been effected in the class of cases or the parties made eligible to petition, the "power and authority" in the case were left the same as before; that is, to review

> "with the same power and authority in the case as if it had been carried by appeal or writ of error to the Supreme Court."

Appeal, of course, has no place in the discussion.

As held in the *Sanges case*, before the Criminal Appeals Act, this court had no power or authority to review, by writ of error,

> "a criminal case of any grade after judgment below in favor of defendant."

By the Criminal Appeals Act, jurisdiction was conferred to review by writ of error a certain limited class of judgments adverse to the Government in criminal

cases. In both the *Keitel* and *Dickinson cases*, the Court held that such review by writ of error was strictly limited to the enumerated cases. A grant, therefore, of the alternative writ of certiorari, expressly limited to "the same power and authority of review" existing by writ of error, does not, through any inherent quality of the writ of certiorari, enlarge the scope of review. It would be a contradiction in terms. Nor, *a fortiori*, in the face of such contradictory terms, is it possible

> "to presume an intention on the part of Congress to make so serious and far-reaching an innovation in the criminal jurisprudence of the United States."

Since the amendment of 1911, in several instances the Government has petitioned for certiorari to review a judgment adverse to it in a criminal case, but in each instance—other than the present case—the court has refused to grant the writ, without opinion.

> *United States* v. *A. Gero Marshall, 226 U. S. 607.*
> *United States* v. *John H. Patterson, 238 U. S. 635.*

B. Propriety.

If it is considered that the Court has jurisdiction to review, under the writ, a judgment adverse to the Government in a criminal case, then it is contended that the instant case is not a proper one to appeal to the court's discretion.

The Court has repeatedly said that it will exercise its discretion to review by certiorari,

> "sparingly and with great caution, and only in cases of peculiar gravity and general importance, or in order to secure uniformity of decision."
>
> *American Construction Co.* v. *Jacksonville Railway, 148 U. S. 372, 383.*
> *Lau Ow Bew, Petitioner, 141 U. S. 583; s. c., 144 U. S. 47.*
> *Magnum Import Co.* v. *Coty, 262 U. S. 159, 163; 67 L. Ed. 922.*

It is well settled that, except in such extraordinary cases as *Forsyth* v. *Hammond, 166 U. S. 506,* the Court will not issue its writ except to review a final judgment.

> *American Construction Co.* v. *Jacksonville Railway, 148 U. S. 372, 384.*
> *The Conqueror, 166 U. S. 110, 113.*
> *The Three Friends, 166 U. S. 1.*
> *Chicago & Northwestern Ry. Co.* v. *Osborne, 146 U. S. 354.*

In the instant case there is present not one of the considerations which the Court has indicated appeal to its discretion. There is not even a final judgment, but, instead, the mandate is for a new trial (*Rec., p. 1692*).

It may be that the Court granted the writ on the erroneous representation of the petitioner—doubtless inadvertently made in the absence of the mandate—that the Circuit Court of Appeals had "reversed and remanded for dismissal" the case, when the errors found by the Court "warranted the Circuit Court of Appeals at most in remanding the case for a new trial"; as the conclu-

sion of the petitioner's argument is that the writ should be issued

> "in view of the public importance of the questions involved, and the extraordinary action of the Circuit Court of Appeals in reversing and remanding for dismissal, instead of at most remanding the case for a new trial." (*Petition, pp. 8, 9*).

With the record containing the mandate available now, however, it is apparent that the grounds supposed to have warranted an exception to the rule against removal before final decree do not exist.

If the representations contained in the petition were not made under a misapprehension as to the contents of the mandate, they must have been made under a misapprehension of elementary principles concerning what constitutes finality of judgments.

This Court has repeatedly held that a mandate for a new trial, or even a direction to proceed in accordance with the opinion or law, is not a final judgment.

As stated in *Hazeltine* v. *Central Bank, etc., No. 1, 183 U. S. 130,*

> "The face of the judgment is the test of its finality."

Chicago & Northwestern Ry. Co. v. *Osborne, 146 U. S. 354,* not only was a direction to proceed in accordance with the opinion which involved a holding by the Circuit Court of Appeals that a verdict should have been instructed for the defendant, but it also involved a question of the construction of the Interstate Commerce Act, which this case does not. Yet certiorari was denied, because the judgment was not final.

The petition shows no other extraordinary questions of peculiar gravity or general importance. There is no question of international importance, treaty construction, or uniformity of decision involved; nor is there any question of constitutional law or statutory construction involved. The only questions of statutory construction occurring in the case at all were those raised by the respondent, and ruled against it by the District Court; and, although such rulings were assigned as error and argued in the Circuit Court of Appeals, that Court decided none of them, but based its decision purely on questions of evidence, as is apparent from the excerpts from its opinion, *ante pp. 6, 7* (*Rec., pp. 1691, 1692*). The most important of these questions of law raised by the respondent in the District Court was that under the authority of the *American Tie & Timber Co. case, 234 U. S. 138*, the question of the proper classification of the commodity shipped was an administrative one within the exclusive primary jurisdiction of the Interstate Commerce Commission to decide, which contention the Government there vigorously opposed and was sustained by the District Court, and, as before stated, the Circuit Court of Appeals did not pass on respondent's assignments of error in that ruling.

Now, however, in a deft effort to raise a question appealing to the exercise of this court's discretion, the Government, in this court, in effect attempts to reverse its position and for the first time contend that the doctrine theretofore opposed by it is applicable. Why? Because, since the trial of the case, the Interstate Commerce Commission has rendered a decision (*Southern Carbon Co.* v. *A. & L. M. Ry. Co., 62 I. C. C. 733*) which

it is claimed decided impliedly that the proper classification of the material is "gasoline", and which decision, under the doctrine of the *American Tie & Timber Co. case, supra,* presumably it would be contended is controlling in this case (*Petition, p. 6*). But the claim itself is specious, as a reference to the decision of the Commission will readily disclose. The Commission did not have under consideration the question whether the classification of gasoline or that of unrefined naphtha was applicable; there were no unrefined naphtha rates or classification involved in the case. The question considered and decided in that case was purely whether the rates on gasoline, as applied to the condensate there involved, were reasonable. There is not even anything in the report of the Commission to indicate that the condensate involved in that case was the same as that involved in the instant case. But, all this aside, there is, for review or correction, no judgment or ruling of the Circuit Court of Appeals on the point.

The only other alleged ruling of supposed gravity or general importance attempted to be set up by the petition is the supposed practical nullification of

> "the powers of the Government under the so-called Transportation of Explosives Act",

growing out of the fact that

> "the opinion of the Circuit Court of Appeals *does not even mention* the Commission's explosive regulations." (*Petition, p. 5*).

Here again is an effort upon the part of the Government to raise in this court, for the first time, a question

which did not even exist in the court below—and that by taking a position directly opposite to that taken by it in the District Court. The obvious purpose is an ingenious attempt to argue to this court that, because of the fact that the safe transportation regulations prescribed by the Interstate Commerce Commission are published by the carriers in their classifications, those regulations thereby become controlling descriptions for rate purposes. This argument was not attempted to be made in the District Court—and could not be consistently made with the way the indictment is pleaded. On the contrary, the Government expressly conceded that it was not contending that the safe transportation regulations as such had not been complied with (*Rec., pp. 221-230, 429-441*); and the Court instructed the jury that they were not in question (*pp. 928, 929, 942, 943*). This concession would itself destroy the Government's case, even if there was any merit in the argument; but it is in fact utterly without merit. In the first place, the rules in question are rules promulgated by the Interstate Commerce Commission under the Transportation of Explosives Act (*35 Stat. 1134*)—not under its authority to prescribe rates and classifications for rate purposes—and are a set of rules which govern the packing and the description to be used in billing and labelling the articles covered thereby, in the interest of safety (*Rec., p. 1241*). And finally the argument destroys itself because one of the first rules of those regulations, *i. e.* 1712, is that such articles

> "must be properly described by the shipper in his shipping order and bill of lading under the specific

> or general name provided for the description of such freight *by the carrier's classification and tariff governing.*" (*Rec., p. 1243*).

Manifestly, if the specific name of the material shipped was "unrefined naphtha", the very rules themselves would require the use of that description for *classification and rate purposes,* even though an additional different description was required by subsequent rules for safety purposes. Moreover, no such conflict in fact existed in the rules in force prior to September 1, 1918, which merely provided, so far as safety was concerned, that, while certain other condensate *must* be shipped under the description "liquefied petroleum gas," that here involved "*may be* described and shipped as gasoline" (*Rec., pp. 429-441, 1225*).

The rules governing safety description in force from September 1, 1918, provided that the condensate here involved

> "*must* be described and shipped as gasoline, casinghead gasoline, or casinghead naphtha" (*Rec., p. 1259*);

and the evidence shows, not only by the shipping orders themselves, which are exhibits in the case (*Rec., pp. 942, 943*), but also by the express admission of the Government, that this regulation was complied with by the use of the double descriptions "Casinghead Naphtha" and "Unrefined Naphtha" on the shipping orders (*Rec., pp. 227, 229, 230, 942, 943*).

However, as previously pointed out, in this respect also there is no question, ruling or judgment involved in

the Circuit Court of Appeals' opinion or mandate affecting the subject in any way whatever.

There is in fact involved therefore in the judgment of the Circuit Court of Appeals no decision of any question of law for review by this Court. Upon a review thereof this Court might differ with the Circuit Court of Appeals concerning the admissibility of evidence, or upon the conclusion of fact from the legitimate evidence in the case, which it may be claimed is inferred by that court's conclusion that a verdict for the defendant should have been directed thereon. But it is not understood that this Court issues its writ of certiorari for the exercise of any such function.

> *Southern Power Co.* v. *N. C. Pub. Ser. Com., — U. S. —; 68 L. Ed. 198 (No. 110, October Term, 1923, decided Jan. 7, 1924).*
> *Union Pacific Ry. Co.* v. *United States, 116 U. S. 154.*

United States v. *Patterson, 238 U. S. 635,* where this Court declined to issue its writ, presented a situation practically identical with that here involved.

Under the circumstances above pointed out, it is thought that this court granted its writ under a misapprehension as to the questions or situation involved, and, upon being thus advised of the actual situation and questions involved, will dismiss it as having been improvidently issued.

II.

The judgment of the Circuit Court of Appeals should be affirmed, because the questions on which the decision of the cause depends are so frivolous as not to need further argument.

Since if this Court should agree with the Circuit Court of Appeals that prejudicial error had occurred in the trial of the case its judgment would be to affirm the mandate of that Court for a new trial, it remains to be seen whether the conclusions of the Circuit Court of Appeals concerning the assignments of error upon which it passed are open to other than frivolous argument.

The first group of assignments of error *(Rec., pp. 1544-1548, 1550-1553, 1599-1601, 1632, 1638, 1640, 1641, 1663)* ruled upon by the Circuit Court of Appeals *(p. 1690)* was as to the insistence of the prosecution throughout the trial, during the introduction of evidence and in argument, that the conduct of the defendant was fraudulent. One of the grounds of this insistence was the fact that the defendant's traffic agent had asked the carriers to institute the lower rates on unrefined naphtha, whereas until then the product had been shipped under the designation "gasoline".

In the first place the evidence itself was utterly inadmissible, because it had no probative force whatever and was a clear violation of the *res inter alios acta* rule.

If there had been unrefined naphtha rates, as well as gasoline rates, in force at the times the commodity had been shipped under the designation "gasoline", offering

a choice of terms, the evidence might have had some probative force on the theory of admissions.

1 Wigmore on Evidence, Secs. 32, 33, 442.
Lake Erie & W. R. Co. v. *Muff, 132 Ind. 168.*
Chicago, St. L. & P. R. Co. v. *Champion, 32 N. E. Rep. 874.*
Emerson v. *Lowell Gaslight Co., 3 Allen, 410, 417.*
Hunt v. *Lowell Gaslight Co., 8 Allen, 169, 171.*
Baxter v. *Doe, 142 Mass. 558, 561.*
Reeve v. *Dennett, 145 Mass. 28.*
State v. *Justus, 11 Oregon, 182.*
Leonard v. *Southern Pacific Co., 21 Oregon, 555, 559.*
Cohn v. *Saidel, 71 N. H. 558; 53 Atl. Rep. 800.*
U. S. Fidelity & G. Co. v. *Des Moines National Bank, 145 Fed. Rep. 273.*
Bird v. *United States, 180 U. S. 356, 359.*
Barney v. *Rickard, 157 U. S. 352, 367.*
Thompson v. *Bowie, 4 Wall. 463, 471.*
United States v. *Ross, 92 U. S. 281.*
Hall v. *United States, 150 U. S. 76, 81.*
United States v. *Baxter, 46 Fed. Rep. 350.*

The Government argued in the Circuit Court of Appeals that the evidence was relevant because, if the material was not gasoline, shipping it as such would have been a crime under the Interstate Commerce Act.

If such were in fact the case, it of course would not make the evidence relevant; but such is not the fact in any event.

It might well be that, under what is known as the analogy rule of carriers' classifications, "gasoline"

would be the nearest analogous article in the absence of a specific classification "unrefined naphtha".

The Interstate Commerce Commission has itself repeatedly held that where under the classification two designations might be applicable, the more specific would prevail.

Colorado C. & F. Co. v. *Atchison, T. & S. F. Ry. Co., 83 I. C. C. 267.*
U. S. Industrial Alcohol Co. v. *Southern Ry. Co., 68 I. C. C. 389.*
Highland Park Mfg. Co. v. *Southern Ry. Co., 26 I. C. C. 67.*
Augusta Veneer Co. v. *Southern Ry. Co., 41 I. C. C. 414.*

But where there are two descriptions equally appropriate, the shipper is entitled to take the one upon which the lower rate applies.

Ohio Foundry Co. v. *P. C. C. & St. L. Ry. Co., 19 I. C. C. 65.*
St. Louis B. F. Co. v. *Virginian Ry. Co., 24 I. C. C. 360.*
United Verde C. Co. v. *Pennsylvania Co., 48 I. C. C. 663.*
National Elevator Co. v. *Chicago, M. & St. P. Ry. Co., 246 Fed. Rep. 588.*

And the repeated insistence of the Government that such evidence imported fraud on the part of the defendant, in the face of the fact that the Interstate Commerce Commission itself had in its decision (which was received in evidence) in the *National Refining Co. case, 23 I. C. C. 527*, required the establishment of rates on substantially

the same commodity on the same basis upon which the carriers established the unrefined naphtha rates, could not but be highly prejudicial.

The next group of assignments of error *(Rec., pp. 1546-1550, 1591, 1595, 1596)* ruled upon by the Circuit Court of Appeals *(p. 1690)* was as to the admission of evidence to the effect that defendant's subsidiary concurrently shipped the same commodity to defendant at Pittsburgh, Pa., under the designation "gasoline".

The evidence further showed that there were no unrefined naphtha rates to Pittsburgh, and consequently there was no choice of terms.

The evidence was therefore without probative force whatever, as held by the Circuit Court of Appeals and as shown by the foregoing authorities.

The next group of assignments of error *(Rec., pp. 1569-1588, 1640-1645)* ruled upon by the Circuit Court of Appeals *(p. 1690)* was with respect to the admission of a large mass of testimony concerning the practice of numerous other shippers (in no wise affiliated with the defendant) in shipping condensates produced by them as "gasoline", when the evidence showed that in such instances there was no choice of descriptions available. It further was not shown in some instances whether the material shipped by such other shippers was the same, or even substantially the same, as that shipped to defendant; and in the other instances it was shown that it was in fact different, and in some cases quite substantially so.

This evidence not only violated every element of the *res inter alios acta* rule—and was pure hearsay, so far

as the defendant was concerned—but it lacked even the claim to the quality of admissions made as to the evidence dealt with in the two preceding groups of assignments of error.

The next two assignments of error *(Rec., p. 1663)* ruled upon by the Circuit Court of Appeals *(pp. 1690, 1691)* were: *(a)* statements by Government counsel in argument that the scientific institute with which two of defendant's expert witnesses were connected was founded by defendant's president, concerning which there was no evidence of the kind in the record, and which, as the Circuit Court of Appeals said,

> "could have been made for no other purpose than to prejudice the jury against"

those witnesses *(Rec., p. 1691)*; and *(b)* argument to the jury by Government counsel to the effect that the jurors had a pecuniary interest in the verdict, in that they would be required to contribute to the deficit from government operation of railroads which would be increased by the alleged fraudulent conduct of defendant.

It is not uncommon for prosecutors to go outside the record or make misstatements in the course of argument concerning some of the facts in issue, and such action may not always be considered necessarily prejudicial. But when, as here, the matter in question has no relation to the issues, and the conduct could have no other possible purpose than an attempt to prejudice the jury, the prosecution ought not to be heard to argue that such course was not in fact prejudicial. Surely in making such statements the prosecutors must have believed they

would have been efficacious in prejudicing the defendant, else why would they have indulged in them? Can the Government with any sincerity argue to this Court now, that, although the result sought by the prosecutors was accomplished, it was not contributed to by that which those prosecutors designed should contribute thereto?

The remaining assignment of error (*Rec., p. 1691*) ruled upon by the Circuit Court of Appeals (*Rec., p. 1691*) was the refusal to instruct a verdict for the defendant.

When the case is stripped to the legitimate evidence in it, it is scarcely arguable that a verdict ought not to have been instructed. The evidence erroneously admitted constitutes probably more than three-fourths of the whole. Apparently the prosecution considered it not only legitimate evidence, but necessary, else why would it have so insistently urged it upon the Court, over defendant's objections? If the Government *then* thought such evidence was necessary to make out its case, how can it argue *here* that the Circuit Court of Appeals erred in holding that without this great mass of evidence there was insufficient to go to the jury? The Government's petition itself concedes almost unreservedly that there were errors warranting a new trial (*Petition, pp. 8, 9*). What other judgment could be entered than that contained in the mandate of the Circuit Court of Appeals—a new trial?

> "But if, in point of law, the judgment ought to be affirmed, it is the duty of this court to affirm it (6 Cranch, 268). We cannot, with propriety, re-

verse a decision which conforms to law, and remand a cause for further proceedings."

Benney v. *Chesapeake & Ohio Canal Co.*, 8 *Peters*, 214.

CONCLUSION.

It is submitted that either the motion to dismiss or that to affirm should be granted.

Respectfully submitted,

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